

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7033 OF 2005

M/s. Shree Balaji Road Lines ..Petitioners.

Versus

1. The Estate Officer & Ors. ..Respondents.

Mr.R.A.Thorat with R.D.Suvarna for the Petitioners.
Mr.U.J.Makhija i/by M/s. Mulla & Mulla for the
Respondent Nos. 1 & 2.

CORAM : S. A. BOBDE, J.
DATED : 17TH OCTOBER, 2005.

P.C.:

1. Allowed to delete the respondent No.3 at the request of the learned counsel for the petitioner. Amendment to be carried out forthwith.

2. Rule returnable forthwith. Mr.Makhija Advocate, waives service of rule for the respondent Nos.1 and 2. Heard by consent.

3. The petitioner has challenged the impugned judgment and order of the Bombay City Civil Court in Misc.Appeal No.82/2004 decided on 8th September, 2005, holding that the petitioner's Appeal is not maintainable. The appellate court also confirmed the

order of eviction of the petitioner.

4. The main submission raised on behalf of the petitioner is that the learned appellate court committed an error of law apparent on the face of the order in holding the appeal not maintainable since the appellant made a substantial prayer for setting aside the decree of eviction dated 23.04.2004.

5. The relevant facts are that the Estate Officer of the respondent Port of Trust passed a decree for eviction of the petitioner, who was held to be an unauthorised occupant. This order was passed on 23.04.2004. The petitioner applied for having that order set aside on the ground that it is an ex-parte order, he ought to have been heard. The application for setting aside the order was dismissed on 11.08.2004. Apparently, since the order dated 11.08.2004 was last in point of time, the petitioner filed an appeal with the following prayers :-

(a) that the impugned order dated 11.08.2004 passed by the Respondent No.2 in the Appellants' Application dated 24.05.2004 for setting aside exparte order and decree dated 23.04.2004, be set aside and the said

application dated 24.05.2004 made by the Appellants for setting aside the exparte order and decree dated 23.04.2004, passed in case No. E0/E (84) (84-A) of 2002, be made absolute;

(b) that pending hearing and final disposal of the appeal, this Honourable Court be pleased to stay the execution and implementation of exparty order and decree dated 23.4.2004;

(c) interim and ad-interim reliefs in terms of prayer (b) above.

(d) for cost of the appeal, be provided;

(e) such further and other reliefs be granted in favour of the appellants looking at the nature and circumstances of the case.

5. This prayer has been interpreted by the learned appellate court as being a prayer merely for setting aside the order by which the estate officer has refused to set aside the ex- parte order and decree dated 23.04.2004. According to the appellate

court the appeal does not contain a prayer for setting aside the ex-parte decree itself. It is only by adopting highly technical approach that it is possible to support the reasoning of the appellate court. There no need to adopt this approach. There is a clear prayer made by the petitioner in the application for setting aside the exparte decree, vide prayer (a). This prayer is made to the appellate court independently. The effect of granting this prayer can only be the setting aside of the decree. However, the prayer clause is not happily worded and it is fairly accepted by the learned counsel for the petitioner that it could have been more accurately worded.

6. In the circumstances of the case, I am of view that the impugned order which holds the appeal not to be maintainable on the ground that the only order that has be challenged is the order refusing to set aside the ex-parte order and is, therefore, not maintainable, is not correct.

7. However, having regard to the circumstances of this case and with a view to give an opportunity to the respondent Port Trust to meet with a clear prayer on behalf of the petitioner that his order of eviction be set aside, I consider it appropriate in the

interest of justice to set aside the impugned order and allow the petitioner to amend the memo of appeal as may be advised in accordance with law.

8. The appellate court after having decided the amendment application, shall decide the appeal in accordance with the law on merits without being influenced by any of the observations made by this court. All the contentions of both the parties are left open.

9. Rule is made absolute in the above terms.

DT. 17.10.05

(S.A.BOBDE, J)

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